



PROSECUTION GUIDELINES

UNSATISFACTORY PROFESSIONAL CONDUCT AND PROFESSIONAL MISCONDUCT

INTRODUCTION

1. The practice of law in Queensland is regulated by the [*Legal Profession Act 2007*](#) (the Act). One of the main purposes of the Act is 'to provide for the protection of consumers of legal services and the public generally.'¹
2. The Act establishes a system for dealing with complaints about the conduct of legal practitioners. The main purposes of the system are:
 - to provide for the discipline of the legal profession;
 - to promote and enforce the professional standards, competence and honesty of the legal profession; and
 - to provide a means of redress for consumers of the services of the legal profession.²
3. The Act establishes the office of the Legal Services Commissioner (the Commission) as the sole body authorized to receive complaints. It requires the Commission to investigate complaints that allege unsatisfactory professional conduct or professional misconduct³ and gives it discretion to commence investigations in the absence of complaint if it believes an investigation is warranted

¹ The *Legal Profession Act 2007*, section 3

² section 416

³ sections 435-436

(investigation matters).⁴ It gives the Commission power to investigate complaints or investigation matters itself or to refer them to the Law Society or Bar Association for investigation but, if it refers them to the professional bodies, the investigations remain subject to the Commission's direction and control⁵ and the professional bodies have recommendatory powers only. It obliges them to report their findings and recommendations to the Commission⁶ and gives the Commission sole authority to decide what action, if any, to take on a complaint or investigation matter after the investigation is completed.

4. The Act gives the Commission wide discretion in the exercise of that authority. It says the Commission:
 - 'may start a proceeding before a disciplinary body' (make a discipline application) in relation to a complaint or investigation matter that has been or continues to be investigated 'as the Commissioner considers appropriate';⁷ and
 - 'may dismiss a complaint or investigation matter if [it] is satisfied that:
 - there is no reasonable likelihood of a finding by a disciplinary body of... either unsatisfactory professional conduct or professional misconduct (or for a law practice employee, misconduct); or
 - 'it is in the public interest to do so.'⁸

5. These guidelines describe how the Commission will exercise that discretion. They:
 - are intended to ensure that the staff of the Commission, legal practitioners and law practice employees, their advisors, legal consumers and members of the public alike understand how the Commission comes to a decision to make a discipline application;
 - can be expected to evolve in the light of the Commission's experience and to be updated from time to time in the light of that experience; and
 - have the status only of guidelines, not prescriptive rules. They do not have the force of law.

⁴ section 435(1)(c)

⁵ section 435(3)-(5)

⁶ section 439

⁷ section 447

THE KEY CONCEPTS

6. The system for dealing with complaints and discipline in Queensland as elsewhere has drawn traditionally on two key concepts - the concepts of unprofessional conduct and professional misconduct.
7. The [Queensland Law Society Act 1952](#) defined unprofessional conduct to mean 'serious neglect or undue delay or the charging of excessive fees or costs or the failure to maintain reasonable standards of competence or diligence.' It added that the definition 'does not limit the type of conduct or practice that may be regarded as unprofessional.'⁹
8. The concept of professional misconduct has a well established meaning at common law. It means conduct that:
 - 'would be reasonably regarded as disgraceful or dishonourable by [a practitioner's] professional brethren of good repute and competency'¹⁰ or
 - 'may reasonably be held to violate or to fall short of, to a substantial degree, the standard of professional conduct observed or approved of by members of the profession of good repute and competency.'¹¹
9. The Act replaces the concept of unprofessional conduct with the new concept of unsatisfactory professional conduct and gives further meaning to the concept of professional misconduct.
10. The Act says at section 418 that 'unsatisfactory professional conduct includes conduct of an Australian legal practitioner happening in connection with the practice of law that falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent Australian legal practitioner.'

⁸ section 448

⁹ *Queensland Law Society Act 1952* at section 3B

¹⁰ Lopes LJ in *Allinson v General Council of Medical Education and Registration (1894)* QBD 750 at 768. See also *Re Hodgekiss [1962] SR (NSW) 340 at 251*; *Kennedy v The Council of the Incorporated Law Institute of NSW (1940)* 13 ALJ 563

¹¹ *Adamson v Queensland Law Society Inc (1990)* 1 Qd R 498 at 507

11. The Act says at section 419(1) that 'professional misconduct includes:

- unsatisfactory professional conduct of an Australian legal practitioner, if the conduct involves a substantial or consistent failure to reach or maintain a reasonable standard of competence and diligence; and
- conduct of an Australian legal practitioner, whether happening in connection with the practice of law or happening otherwise than in connection with the practice of law that would, if established, justify a finding that the practitioner is not a fit and proper person to engage in legal practice.'

12. The Act goes on to say at section 419(2) that:

- 'for finding that an Australian legal practitioner is not a fit and proper person to engage in legal practice... regard may be had to the suitability matters that would be considered if the practitioner were an applicant for admission or for the grant or renewal of a local practising certificate'

and at section 420 that without limiting s418 or 419:

- the following conduct is capable of constituting unsatisfactory professional conduct or professional misconduct:
 - a) conduct consisting of a contravention of a relevant law;
 - b) charging of excessive legal costs in connection with the practice of law;
 - c) conduct for which a court has convicted an Australian lawyer of:
 - (i) a serious offence; or
 - (ii) a tax offence; or
 - (iii) an offence involving dishonesty;
 - d) conduct of an Australian legal practitioner as or in becoming an insolvent under administration; and
 - e) conduct of an Australian legal practitioner in becoming disqualified from managing or being involved in the management of any corporation under the Corporations Act'.

- (f) conduct of an Australian legal practitioner in failing to comply with an order of a disciplinary body;
 - (g) conduct of an Australian legal practitioner in failing to comply with a compensation order.
13. The Commission notes that the concept of unsatisfactory professional conduct (and hence the concept of professional misconduct also) introduces a new benchmark to the regulation of the legal profession in Queensland – a legal practitioner's conduct is no longer to be assessed by reference only to the standard 'members of the profession of good repute and competency' are entitled to expect of their fellow practitioners but by reference also to the standard 'a member of the public' is entitled to expect.
14. The Commission believes accordingly that the concept of unsatisfactory professional conduct applies to a range of conduct that most people, practitioners included, would regard as unsatisfactory in any ordinary sense of the word but which would not previously have been regarded as 'unprofessional'. The Commission believes it goes beyond unethical or improper conduct to include, depending on the circumstances, the sorts of honest mistakes, errors of judgement and poor standards of client service that give rise to legitimate consumer grievance.

THE STATUTORY TESTS

15. The Commission will not make a discipline application to a disciplinary body unless it is satisfied that the evidence after investigation establishes both that:
- there is a reasonable likelihood of a finding by the disciplinary body of unsatisfactory professional conduct or professional misconduct (or in the case of law practice employees, misconduct) - the reasonable likelihood test; and
 - it is in the public interest to make a discipline application - the public interest test.

THE REASONABLE LIKELIHOOD TEST

16. The Act requires the disciplinary bodies to be satisfied, before making a finding of unsatisfactory professional conduct or professional misconduct against a legal practitioner (or of misconduct against a law practice employee), that the Commission has proved the allegations in the

discipline application on 'the balance of probabilities'. The disciplinary bodies must be satisfied to a higher degree of satisfaction the more grave the consequences for the legal practitioner or law practice employee of a finding that the allegations are proved.¹²

17. Accordingly, the reasonable likelihood test requires the Commission not to make a discipline application unless there is reliable evidence capable of supporting a finding on the balance of probabilities that a legal practitioner's conduct amounts to unsatisfactory professional conduct or professional misconduct (or that a law practice employee's conduct amounts to misconduct).
18. The Commission will assess the evidence in its totality having regard to:
 - whether the evidence - given previous findings by courts and disciplinary bodies in relation to the same or similar facts - establishes a reasonable prospect of a finding by a disciplinary body that the practitioner's conduct falls within the statutory definitions of unsatisfactory professional conduct or professional misconduct;
 - the strength of the evidence and whether it establishes a reasonable prospect of a successful prosecution - or whether there are competing versions of events such that the decision 'could go either way';
 - whether some evidence might be excluded bearing in mind the principles of admissibility at common law and under the Act;
 - whether there are lines of defence that have been indicated by or are plainly open to the respondent practitioner;
 - whether witnesses are willing and available to give evidence;
 - whether witnesses are likely to make a good impression; whether there are matters that might properly be put to them by the respondent to attack their credibility; and how they are likely to stand up to cross examination;
 - the possibility that witnesses might have a faulty memory or be exaggerating or have a motivation to tell less than the whole truth or otherwise be unreliable;

¹² section 649, and see also [Briginshaw v Briginshaw](#) (1938) 60 CLR 336 and *NSW Bar Association v Livesey* [1982] 2 NSWLR 231 at 238

- any other factors the Commission believes in all the circumstances might impact the likelihood of a finding by a disciplinary body of unsatisfactory professional conduct or professional misconduct.
19. The Commission wants it to be understood that:
- even if it is confident of the likelihood of a finding by a disciplinary body of unsatisfactory professional conduct or professional misconduct, it is in no position except in uncontested matters to assure complainants or other interested parties that a discipline application will succeed; and
 - a decision not to make a discipline application in circumstances where it is 'one person's word against another's' does not mean that the Commission believes one person and not the other - just that it does not believe the evidence in its totality is sufficient to support a reasonable likelihood that a disciplinary body will find one person's version of events to be proved and not the other's.

THE PUBLIC INTEREST TEST

20. The Commission does not believe the public interest requires it to make a discipline application whenever it is satisfied there is a reasonable likelihood a disciplinary body will make a finding against a practitioner of unsatisfactory professional conduct or professional misconduct – and will exercise its discretion accordingly.
21. It is well established in law that 'the object of disciplinary action against legal practitioners is not to exact retribution: it is to protect the public and the reputation of the profession.'¹³ The Commission recognises that there are sometimes equally effective but more cost-efficient ways to protect the interests of the public and the reputation of the profession than by prosecuting an errant practitioner in the expectation the practitioner will be punished for his or her conduct.
22. The Commission will exercise its discretion to make a discipline application or otherwise having regard to:¹⁴

¹³ [Legal Services Commissioner v Baker \[2005\] QCA 482](#)

¹⁴ The Commission has adopted, with appropriate modifications, the list of considerations the Commonwealth and Queensland Directors of Public Prosecutions take into account in exercising their counterpart discretion.

- the seriousness of the alleged unsatisfactory professional conduct or professional misconduct, and the need to protect the public from the respondent legal practitioner or law practice employee;
- the likely prejudice to public confidence in the integrity of the disciplinary process and to the reputation of the profession if the Commission exercises its discretion not to make a discipline application;
- the apparent prevalence of the conduct, and the need to 'send a message' to deter other legal practitioners or law practice employees from engaging in such conduct;
- whether the conduct raises a matter of law or professional practice of general importance;
- whether the conduct involved dishonesty or taking advantage of vulnerable clients or third parties or was pre-meditated,
- whether the conduct was a genuine mistake or misunderstanding and is unlikely to be repeated;
- whether the respondent acknowledges his or her error, or has shown remorse or apologized or made good any loss or harm his or her conduct has caused to others;
- whether the respondent co-operated fully and frankly during the investigation into his or her conduct;
- whether a finding of unsatisfactory professional conduct or professional misconduct would entitle the complainant or others who may have been adversely effected by the conduct to compensation;
- the respondent's age, health or infirmity;
- whether there have been any previous disciplinary findings against the respondent;
- the likely length and expense of the hearing;
- the likely disciplinary outcome if an application proceeds, and whether the respondent agrees to initiate the same or similar outcome him or herself - for example, by undertaking to complete a stated course of further legal education or to be subject to periodic inspection by a person nominated by the Commission or other regulatory body or to engage in legal

practice only subject to stated conditions or to take advice from a stated person in relation to the management of his or her practice;¹⁵

- whether there are grounds for special leniency (see LENIENCY, below); and
 - any other relevant consideration.
23. Some of these considerations (the need to send a message, for example) tend to weigh in favour of making a discipline application. Others (the respondent's acknowledgement of his or her error, for example, or agreement to undertake further legal education or to change his or her work practices or systems) tend to weigh in favour of dismissing the complaint or investigation matter in the public interest. Generally speaking, the more serious the alleged unsatisfactory professional conduct or professional conduct, the less likely the Commission will exercise its discretion to dismiss a complaint or investigation matter in the public interest.

LENIENCY

24. The Commission wants to encourage legal practitioners and law practice employees whose conduct may have fallen short of expectation or who know of others whose conduct may have fallen short of expectation to come forward to assist the Commission in its work.
25. Accordingly and in the public interest, the Commission will actively consider being lenient with legal practitioners and law practice employees who:
- voluntarily come forward with relevant evidence of conduct that contravenes the Act but that the Commission has either no knowledge of or insufficient evidence to make a discipline application; and
 - provide the Commission with full and frank disclosure of the conduct in question and any documentary or other evidence that may be available or known to them; and
 - undertake to cooperate throughout the Commission's investigation and comply with that undertaking; and

¹⁵ sections 456 and 458 set out the orders the Legal Practice Tribunal and the Legal Practice Committee respectively may impose.

- have not compelled or induced any other person to take part in the conduct in question or been a 'ringleader' in instigating the conduct.
26. The Commission may be lenient in either of two ways, by:
- not making a discipline application in circumstances when it otherwise would; or
 - undertaking to make submissions to a disciplinary body in mitigation of the penalty that might otherwise be appropriate.

DECIDING THE DISCIPLINARY BODY

27. The Act establishes two disciplinary bodies - the Legal Practice Tribunal and the Legal Practice Committee. It gives the Legal Practice Tribunal power to hear and decide discipline applications which allege either unsatisfactory professional conduct or professional misconduct by legal practitioners.¹⁶ It gives the Legal Practice Committee power to hear and decide discipline applications which allege unsatisfactory professional conduct by legal practitioners or misconduct by law practice employees.¹⁷
28. The Commission will not in the ordinary course of events make a discipline application to the Legal Practice Tribunal unless it is satisfied there is a reasonable likelihood the Tribunal will find the conduct subject to the application to be professional misconduct.
29. The Commission may make a discipline application to the Legal Practice Tribunal in the absence of a reasonable likelihood the Tribunal that will find the conduct subject to the application to be professional misconduct if:
- it believes there is a need for an authoritative statement of the law in relation to the conduct and the Tribunal is reasonably likely to make such a statement in the course of deciding the application; or
 - it believes the gravity of some alleged unsatisfactory professional conduct warrants a penalty beyond the powers of the Legal Practice Committee. (The Commission expects that this will be the case only very rarely, if at all.)

¹⁶ sections 452 and 456

¹⁷ sections 452 and 458

CONCLUSION

30. The Commission will endeavour to apply these guidelines consistently, fairly and transparently. It will deal with complaints and investigation matters on a case by case basis on their individual merits having regard to the evidence in its totality and to:
- the broad purposes and specific requirements of the Act;
 - the well established principle that professional discipline should be directed primarily to the protection of the public rather than the punishment of errant practitioners;¹⁸
 - the desirability of maintaining and enforcing high standards of professional and personal conduct among legal practitioners and public confidence in the legal system and the profession.¹⁹
31. The Commission will not allow itself to be influenced in coming to a decision to make a discipline application or alternatively to dismiss a complaint or investigation matter by:
- the race, religion, sex or political association, activities or beliefs or any other personal characteristic of the respondent legal practitioner or law practice employee or any other person or persons who may be involved;
 - the Commissioner's personal feelings or the personal feelings of the staff of the Commission about the alleged conduct, the complainant, the respondent or any other person or persons who may be involved;
 - any possible political disadvantage to the government of the day or other political party or any possible media or community reaction to the decision; or
 - the possible impacts of the decision on the personal or professional circumstances of the Commissioner or staff of the Commission or members of the disciplinary bodies or any other person or persons who may be or be perceived to be responsible for the conduct and outcome of the disciplinary proceedings.

¹⁸ [Clyne v NSW Bar Association](#) (1960) 104 CLR 86; [A-G v Bax](#) (1999) 2Qd R 222; Law Society of NSW v Foreman (1994) 34 NSWLR 408

¹⁹ [Ziems v Prothonotary of NSW](#) (1957) 97 CLR 279 at 285-286 and [Legal Services Commissioner v Baker](#) (2005) LPT 002